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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-388

JOSEPHINE A. DILLON, Committee of HILDA NADINE AMIDON, a legally incompetent person,
Petitioner,

v.

POTOMAC HOSPITAL CORPORATION,
Respondent.

AMICUS CURIAE
MOTION AND BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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v.

POTOMAC HOSPITAL CORPORATION,
Respondent.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Now come 371 individuals (See Appendix), by counsel, and pursuant to Rule 36.1 of the Rules of the Supreme Court of the United States, would respectfully request leave of this Honorable Court to file an *amicus curiae* brief in support of the Petition for a Writ of Certiorari to the Supreme Court of Virginia in the above-styled matter. In support of this motion, the *amicus curiae* petitioners would respectfully show the following:

1. Your Petitioners are plaintiffs in asbestos products liability litigation in the United States District Court for the Eastern District of Virginia wherein multiple asbestos products manufacturers are alleged to be joint tortfeasors whose defective

products are alleged to have caused the plaintiffs to contract permanently disabling and/or fatal diseases of asbestosis, lung cancer, and mesothelioma.

2. Each Plaintiff has partially settled his claim against one or more of those asbestos manufacturers, pursuant to the presumed validity and constitutionality of Virginia's Partial Settlement Statute, Sec. 8.01-35.1 of the Virginia Code.

3. Multiple non-settling Defendants remain in each Plaintiff's personal injury or wrongful death case.

4. Virginia Code Sec. 8.01-35.1 was enacted by the Virginia General Assembly in 1979 to permit partial settlements in complex multi-party tort litigation and to abolish the anachronistic common law rule that settlement with one joint tortfeasor released all non-settling joint tortfeasors.

5. The effect of a covenant not to sue pursuant to the Virginia Statute is that it discharges the tortfeasor to whom it is given from all liability for contribution from any other tortfeasor.

6. In 1982 the statute was expressly amended by the Virginia General Assembly to make it apply to all pending causes of action, irrespective of when the cause of action accrued. (Sec. 8.01-35.1D, VA. CODE ANN.)

7. For five years after its enactment, numerous State and Federal courts, law review commentators, and the Virginia Attorney General opined that this statute was a legitimate and constitutional exercise of legislative prerogative because it was "remedial" and did not adversely affect any "vested rights."

8. In *Dillon v. Potomac Hospital Corporation*, 229 Va. _____, 329 S.E. 41 (1985), the Virginia Supreme

Court found that "inchoate causes of action for contribution" between joint tortfeasors arise at the time that the joint tortfeasors committed their negligent acts; that although this inchoate cause of action for contribution is not a "vested right," it is nevertheless a "substantive right" that could not be retroactively impaired without violation of the constitutional protection of "due process." The Virginia Court then reversed a jury verdict against the Potomac Hospital for medical malpractice that occurred in 1977 because in 1983 the Plaintiff (in reliance upon Sec. 8.01-35.1D) had partially settled with several joint tortfeasors.

9. As in *Dillon, supra*, the negligent acts of the Defendants in your Petitioners' asbestos products liability actions occurred prior to the enactment of Sec. 8.01-35.1 of the Virginia Code. The non-settling Defendants in these cases, therefore, contend that your Petitioners' cases should be dismissed pursuant to the common law rule that release of one joint tortfeasor releases all non-settling joint tortfeasors.

10. Application of *Dillon*'s unique, unprecedented, and erroneous interpretation of "due process" to your Petitioners, all of whose partial settlements were also made after the enactment of Sec. 8.01-35.1D of the Virginia Code, would have at least three far-reaching and tragic effects:

First, it would result in the unjust and unanticipated dismissal of hundreds of lawsuits against non-settling Defendants who would receive a windfall for their recalcitrance.

Secondly, it will effectively foreclose any reasonable opportunity for hundreds of other asbestos victims--all of whom have cases pending in the United States District Court pursuant to diversity jurisdiction--to settle their claims in the future,

thereby forcing unnecessary, expensive and time-consuming litigation upon the Federal Courts as well as the parties.

Thirdly, it will eliminate the ability of the Virginia General Assembly, and possibly other states, to pass remedial legislation on a variety of social, economic, judicial, or environmental problems in which affected parties have "inchoate" or "substantive" but not "vested" rights.

Counsel for the Petitioner, Josephine A. Dillon, consented to the filing of this Motion for Leave to File *Amicus Curiae* Brief in Support of Petition for a Writ of Certiorari to the Supreme Court of Virginia, but the attorneys for the Respondent, Potomac Hospital Corporation, have refused to consent to the filing of a brief by your *amicus curiae* Petitioners.

WHEREFORE, your Petitioners hereby request leave to file an *amicus curiae* brief in support of the Petitioner, Josephine A. Dillon, Committee of Hilda Nadine Amidon, to the opinion of the Virginia Supreme Court in *Dillon v. Potomac Hospital, supra.*

Respectfully submitted,

By

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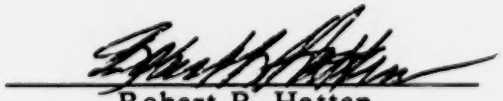
CERTIFICATE

I hereby certify that a true copy of the foregoing Motion for Leave to File *Amicus Curiae* Brief in Support of Petition for a Writ of Certiorari to the Supreme Court of Virginia was mailed by first-class mail, postage prepaid on the 9th day of October, 1985, to the following persons: Frank J. Ceresi, Esq., 2300 South 9th Street, Suite 112, Arlington, VA 22204; Robert Loftus, Esq., Miles & Stockbridge, 4069 Chain Bridge Road, Fairfax, VA 22030; and The Hon. William G. Broaddus, Acting Attorney General, 101 N. 8th Street, Richmond, VA 23219.



Robert R. Hatten

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Respondent.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Your *amicus curiae* Petitioners adopt the Petition for Writ of Certiorari to the Supreme Court of Virginia filed by Josephine A. Dillon. This *amicus curiae* brief is submitted in support of and in addition to the reasons heretofore set forth by the Petitioner for granting the writ.

INTEREST OF THE *AMICUS CURIAE* PETITIONERS

Your *amicus curiae* Petitioners are 371 individuals who are plaintiffs in asbestos products liability litigation in the United States District Court for the Eastern District of Virginia wherein multiple asbestos products manufacturers are alleged to be joint tortfeasors whose defective products are alleged to have caused the plaintiffs to contract

permanently disabling and/or fatal diseases of asbestosis, lung cancer, and mesothelioma.

Each *amicus curiae* Petitioner has partially settled his claim against one or more of those asbestos manufacturers, pursuant to the presumed validity and Constitutionality of Virginia's Joint Tortfeasor Release Act, Sec. 8.01-35.1 of the Virginia Code.

This statute was enacted by the Virginia General Assembly in 1979 to permit partial settlements in complex multi-party tort litigation and to abolish the anachronistic common law rule that settlement with one joint tortfeasor released all non-settling joint tortfeasors. In 1982 the statute was expressly amended to make it apply to all ending causes of action irrespective of when the cause of action accrued. Sec. 8.01-35.1, VA. CODE ANN.

In *Dillon v. Potomac Hospital Corporation*, 229 Va. _____, 329 S.E.2d 41 (1985), the Virginia Supreme Court found that "inchoate causes of action for contribution" between joint tortfeasors arise at the time that the joint tortfeasors committed their negligent acts; that although this inchoate cause of action for contribution is not a "vested right," it is nevertheless a "substantive right" that could not be retroactively impaired without violation of the Constitutional protection of "due process." The Court therefore held that Sec. 8.01-35.1D was unconstitutional.

As in *Dillon, supra,* the negligent acts of the Defendants in your Petitioners' asbestos products liability actions occurred prior to the enactment of Sec. 8.01-35.1 of the Virginia Code. The non-settling Defendants in these cases, therefore, contend that your Petitioners' cases should be dismissed pursuant to the common law rule that release of one joint

tortfeasor releases all non-settling joint tortfeasors.

The interpretation of due process as set forth in the *Dillon* case, *supra*, is unprecedented and erroneous for the reasons that are hereinafter set forth. Unless this opinion of the Virginia Supreme Court is overruled, it will result in the unjust and unanticipated dismissal of hundreds of lawsuits against non-settling Defendants who will receive a windfall for their recalcitrance. Further, unless *Dillon* is overruled, it will effectively foreclose any reasonable opportunity for hundreds of other asbestos victims, all of whom have cases pending in the United States District Court to settle their claims in the future, thereby forcing unnecessary expensive and time-consuming litigation upon the Federal Courts as well as the parties.

SUMMARY OF THE ARGUMENT

In *Dillon v. Potomac Hospital Corp., supra,* the Virginia Supreme Court has found that Sec. 8.01-35.1D of the Virginia Code is unconstitutional as applied to inchoate causes of action for contribution which pre-existed the enactment of the statute. This opinion erroneously fails to apply the "rational basis" test as set forth in previous decisions of this Court for evaluation of whether or not retroactive state laws violate the due process clause of the Fourteenth Amendment of the United States Constitution. Should the Virginia Supreme Court be correct in finding Sec. 8.01-35.1D to be unconstitutional, its ruling should be applied prospectively only so as to avoid severe prejudice to those parties who relied upon the presumed Constitutionality of the statute.

ARGUMENT

1. "Inchoate causes of action" are not entitled to due process protection from expressly retroactive state laws.

The limits of due process protection against retroactive statutes has been clearly defined by this Court in numerous recent decisions. *See, Usery v. Turner Elkhorn Mining Corp.*, 428 U.S. 1 (1976), *Pension Benefit Guaranty Corp. v. R. A. Gary & Co.*, _____ U.S. _____ 104 Sup. Ct. 2709 (1984); and *United States v. Locke*, _____ U.S. _____ 105 Sup. Ct. 1785 (1985). These cases have established a "rational basis" test for determining whether retroactive legislation is Constitutionally permissible. In *Usery, supra*, Justice Marshall explained:

> [L]egislative Acts . . . come to the Court with a presumption of Constitutionality and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.
>
> . . . .
>
> [L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations (citations omitted). This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.

428 U.S. at 15-16. This holding was reiterated in *Pension Benefit Guaranty Corp., supra*, where this court held that:

> Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remains within the exclusive province of the legislative and executive branches.
>
> . . . .
>
> The retroactive aspects of legislation . . . must meet the test of due process . . . but that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.

104 Sup. Ct. at 2718.

Determination of whether new legislation adversely affects "vested rights", "substantive rights" or "inchoate rights" is irrelevant, if the "rational purpose" test is satisfied. *See, United States v. Locke, supra.*

In 1979 the Virginia General Assembly abolished the common law rule that release of one joint tortfeasor released all other joint tortfeasors. Sec. 8.01-35.1 VA. CODE ANN. This statute provided that the effect of a release or covenant not to sue is that "it shall discharge the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor." Sec. 8.01-35.1A.2 VA. CODE ANN. The *quid pro quo* to the non-settling joint tortfeasor is a reduction of the jury's verdict in an amount equal to the sum paid by the settling tortfeasor. Sec. 8.01-35.1A.1. In 1982 the Virginia General Assembly amended this statute to make it expressly retroactive to all covenants not to sue executed after July 1, 1979 "regardless of the date the causes of action affected thereby accrued." Sec. 8.01-35.1D VA. CODE ANN.

The legitimate and rational purpose of Sec. 8.01-35.1D of the Virginia Code is obvious and compelling: it encourages voluntary settlements in complex litigation. This objective helps to preserve the time and financial resources of both the litigants and Courts. As the Virginia Supreme Court observed in *Hayman v. Patio Products, Inc.*, 226 Va. 482 (1984),

> We believe the General Assembly intended to change a rule of law which tended to reward a recalcitrant tortfeasor at the expense of a joint tortfeasor who was willing to settle out of Court. . . . The statute facilitates prompt settlement, payment and discharge of paying tortfeasors without releasing those non-paying joint tortfeasors who prefer to have their liability determined in litigation, with its attendant delays.

226 Va. at 487.

The rational purpose accomplished by Sec. 8.01-35.1D of the Virginia Code in the settlement of complex tort litigation is also confirmed by the fact that it is identical to the Federal rule that was first announced by this Court in *ARO Manufacturing Co. v. Convertible Top Replacement*, 377 U.S. 476 (1964).[1] There, Justice Brennan observed that the common law rule which required release of non-settling joint tortfeasors as a penalty for partial settlement, "has been repudiated by statute or decision in many, if not most, states and by the overwhelming weight of scholarly authority." 388 U.S. at 501. The Court then abolished the applicability of the anachronistic common law rule in Federal tort litigation. In so doing, the Court followed well-settled case law that

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[1]Accord, Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348 (1971).

> [a] person has not property, no vested interest, in any rule of the common law. . . . [The] Constitution does not forbid the creation of new rights or the abolition of old ones recognized by the common law, to attain a permissible legislative object, . . . despite the fact that "otherwise settled expectations" may be upset thereby. (citations omitted)

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 88 n.32 (1978).

In *Dillon v. Potomac Hospital, supra*, the Virginia Supreme Court held that the retroactive application of Sec. 8.01-35.1 to "inchoate causes of action for contribution"[2] which existed prior to the enactment of the statute violated due process and was, therefore, unconstitutional. This unprecedented decision fails to mention or discuss the "rational basis" test or any of the pertinent opinions of this Court which have heretofore defined the limits of due process. Instead, the Virginia Court relied upon a previous state decision which held that the 1979 version of Sec. 8.01-35.1 (which was not expressly retroactive) could not be implicitly applied retroactively if it affected pre-existing substantive rights. *See*, Sec. 8.01-35.1 VA. CODE ANN.; *Shiflet v. Eller* 228 Va. 115, 319 S.E.2d 750 (1984). *Shiflet* involved a matter of statutory interpretation, not Constitutional law, but the opinion had cited with approval a United States District Court opinion that retroactive application of Sec. 8.01-35.1 constitutes a "violation of the non-settling Defendants' guarantee of due

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[2]The Virginia Court found that an inchoate cause of action for contribution arises at the time of the jointly negligent acts, not the time that a settlement or verdict results in payment of a disproportionate share of the liability.

process under the law of the United States Constitution." *Carickhoff v. Badger Northland, Inc.*, 562 F. Supp. 160, 165 (W.D. Va. 1983).[3] Unfortunately, the *Carickhoff* decision also failed to mention the "rational basis" test or any of the pertinent opinions of this Court which have clearly defined the limits of due process.

The Virginia Supreme Court's blind acceptance of the erroneous interpretation of the due process clause of the Fourteenth Amendment as contained in the *Carickhoff* decision has led that Court to an unjust and unnecessary end. Had the Court applied the proper standards, i.e., the "rational basis" test, to determine if retroactive application of Sec. 8.01-35.1D was Constitutional, an entirely different result would have occurred.

As in *Dillon*, your *amicus curiae* Petitioner executed covenants not to sue in reliance upon the presumed Constitutionality of Sec. 8.01-35.1D, a statute which served an obviously rational purpose of expediting complex litigation. Unless *Dillon* is overruled, there will be at least three tragic and far-reaching effects:

First, it will result in the unjust and unanticipated dismissal of hundreds of lawsuits against non-settling Defendants who would receive a windfall for their recalcitrance.

Secondly, it will effectively foreclose any reasonable opportunity for hundreds of other asbestos

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[3]The Carickhoff decision is contrary to a previous opinion of the Virginia Attorney General, contrary to numerous Virginia Circuit Court opinions, contrary to numerous law review commentaries, and contrary to other United States District Court opinions. See, authorities infra., at p. 9-12. See also, Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

victims--all of whom have cases pending in the United States District Court pursuant to diversity jurisdiction--to settle their claims in the future, thereby forcing unnecessary, expensive and time-consuming litigation upon the Federal Courts as well as the parties.

Thirdly, it will eliminate the ability of the Virginia General Assembly, and possibly other states, to pass remedial legislation on a variety of social, economic, judicial, or environmental problems in which affected parties have "inchoate" or "substantive" but not "vested" rights.

2. If the *Dillon* opinion is correct, it has established a new Constitutional principle which was not in existence at the time that the Petitioners relied upon the presumed validity of Sec. 8.01-35.1D of the Virginia Code; consequently, this new Constitutional standard should be applied prospectively only.

In *Dillon v. Potomac Hospital Corp., supra.*, the Virginia Supreme Court conceded that the inchoate cause of action for contribution among joint tort-feasors is not a "vested right"; however, the Court found that this inchoate cause of action for contribution was a "substantive right" which could not be retroactively impaired by new legislation without violation of due process.

This holding was particularly surprising because when Sec. 8.01-35.1 of the Code of Virginia was enacted in 1979, the uniform case law in Virginia regarding the Constitutionality of retroactive legislation was that such legislation was Constitutional unless it affected "vested rights." *See, Town of Danville v. Pace*, 25 GRATT 1 (1874); *Humble Oil v. Copley*, 213 Va. 449 (1972); *Brown Committee v.*

Western State, 110 Va. 321, 66 S.E. 49 (1909); *Bain v. Boykin*, 180 Va. 259 (1942); and *Eaton v. Davis*, 176 Va. 330 (1940).[4] In each of these previous decisions of the Supreme Court of Virginia, "substantive rights" of the litigants had been altered by retroactive legislation which abolished rights or duties which existed at the time of the transactions which formed the basis of the litigation.

Indeed, in *Town of Danville v. Pace*, *supra*, the Virginia Supreme Court held:

> Even though a statute may take away vested rights by reason of its retrospective operation, it cannot for that reason merely be treated as repugnant to any provisions contained in the Constitution of the United States.
>
> . . . .
>
> The next inquiry is as to the Constitution of Virginia . . . that the legislature has the constitutional power to pass retrospective laws, laws affecting vested rights, no one will deny who is familiar with the jurisprudence of the country.
>
> . . . .
>
> There is no such thing as a vested right to do wrong.

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[4]This general rule was also well-settled in most other states. See, generally, "Retrospectivity and Retroactivity of Civil Legislation Reconsidered," by Gregory J. DeMars, Ohio N.U.L. Rev., Vol. 10:253-275 (1983); See, e.g., Carl v. Bryant Air Conditioning Company, 331 N.W.2d 456 (1982).

25 GRATT at 10-11, 15. This case has never been overruled and the Virginia Supreme Court failed to mention it in the *Dillon* opinion.

The unprecedented character of the *Dillon* decision is also illustrated by the previous reaction of the Virginia Courts, commentators, and public officials to the Constitutionality of Sec. 8.01-35.1:

In May 1979, the Attorney General of the State of Virginia was asked to render an opinion as to whether Sec. 8.01-35.1 was Constitutional. The Attorney General opined that the statute did not retroactively impair any vested rights, that it was remedial, and that it was Constitutional. He also concluded that the statute would apply "even where the cause of action arose before July 1, 1979." See Appendix D to Petitioner's Brief.

In 1980 a law review commentator remarked that "there is no problem with a retroactive application" of Sec. 8.01-35.1 because any inchoate right of contribution that may exist prior to the effective date of the statute "cannot be a vested right." "The Covenant Not to Sue: Virginia's Effort to Bury the Common Law Rule Regarding the Release of Joint Tortfeasors", Vol. 14 U. Rich. L.R. 809, 829-30 (1980).

Also in 1980 a Virginia Circuit Court ruled that Sec. 8.01-35.1 could be properly applied to a cause of action that arose prior to the effective date of the statute. The Defendants appealed to the Virginia Supreme Court and alleged as a primary reason for reversal that the 1979 statute was unconstitutional because it retroactively impaired the "substantive rights" of the Defendants. On March 12, 1982, the Virginia Supreme Court found no reversible error and denied the Petition for a Writ of Certiorari, thereby affirming the Circuit Court opinion. *Esco Elevator Company, Inc. v. Barbara Dunn*, (Circuit Court for the

City of Richmond, Virginia, December 1980, Rec. No. 810560) *(Petition for Appeal denied 3/12/82, Petition for Rehearing denied 4/30/82).*

In 1982 a United States District Court for the Western District of Virginia ruled that "the date of the release," not the "date that the cause of action arose" determines whether release of one joint tortfeasor releases all. *Statzer v. King Kutter Corp.*, 550 F.2d 1062, 1065 (W.D. Va. 1982).

In January 1984, the Virginia Supreme Court expressly approved Sec. 8.01-35.1 of the Virginia Code and held:

> We will not attribute . . . a useless gesture to the General Assembly. We believe the General Assembly intended to change a rule of law which tended to reward a recalcitrant tortfeasor at the expense of a joint tortfeasor who was willing to settle out of Court. We believe the legislature's intent, as shown by the statutory language, was to promote the use of a covenant not to sue by permitting payment thereunder and discharge of one joint tortfeasor without causing the covenant to effect the release of the other joint tortfeasors. *Hayman v. Patio Products, Inc., supra.*

226 Va. at 487. The Court then proceeded to expressly apply the 1979 statute to a cause of action that accrued in 1977.

In April 1984, the Circuit Court of Prince William County expressly approved the retroactive application of Sec. 8.01-35.1 to a cause of action that accrued in 1977. *Dillon v. Potomac Hospital Corp.*, Memo. Op. (4/16/84). (Appendix A to Petitioner's Brief)

Finally, in May 1984, the United States District Court for the Eastern District of Virginia expressly approved the application of Sec. 8.01-35.1 to an asbestos settlement where the Plaintiff's exposure had ended in 1970, but the cause of action had not been discovered until 1980. *Lydia Cole, Executrix v. Raymark Industries, Inc.*, (see transcript on Motion for Summary Judgment dated May 3, 1984).

Your Petitioners have executed approximately 2,000 separate covenants not to sue[5] with various asbestos manufacturers for asbestos-induced injuries and deaths resulting from negligent acts that occurred prior to the enactment of Sec. 8.01-35.1 of the Virginia Code. Each of these covenants was executed *after* the 1982 amendment to Sec. 8.01-35.1 by which the Virginia General Assembly made the statute expressly retroactive. Your Petitioners, therefore, had no notice that the Constitutional standard of due process as previously established by both this Court and the Virginia Supreme Court would be retroactively changed by the surprising and unprecedented decision of the Virginia Supreme Court in *Dillon*.

The retroactive application of *Dillon*'s new Constitutional standard to your *amicus curiae* Petitioners will result in extreme and unfair prejudice, i.e., the dismissal of all of their lawsuits against all non-settling Defendants. Where such prejudice exists from the application of a new Constitutional standard, the Supreme Court of the United States has found that the Court which declared the new Constitutional standard has a duty to decide whether retroactive or prospective application of the new standard is appropriate. *See, Chevron Oil Co. v. Huson*, 404

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[5]Literally hundreds of covenants not to sue were expressly approved by the United States District Court for the Eastern District of Virginia in wrongful death cases where Virginia law requires that the court approve any settlement.

U.S. 97 (1971); *United States v. Johnson*, 102 Sup. Ct. 2579, 2587 n.12 (1982); and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 102 Sup. Ct. 858 (1982)[6] *Chevron* pointed to three factors that should control a decision about whether to apply a new rule only to future cases.

First, "the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedents on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . ." *Id.* at 355 (citation omitted). Second, the Court must consider whether retroactive application will "further retard" the operation of the new rule. *Id.* Finally, the Court must weigh any "inequity" that would be imposed by retroactive application. *Id.* Applying these factors, a court may elect one of several options, ranging from complete retroactivity, to application only to cases still pending, to a rule of "pure" prospectivity that "denies the benefits of the new rule even to the parties before the court.'" *In re Twin Parks Limited Partnership*, 720 F.2d 1374, 1376 (4th Cir. 1983), *cert. denied*, 104 Sup. Ct. 1602 (1984) (quoting *United States v. Johnson*, 457 U.S. 537, 544 (1982).

All three of the criteria for prospective application of new Constitutional interpretations as described in the *Chevron* case are applicable to the Petitioners. First, the Constitutional protection afforded to substantive rights from the retroactive application of laws that has been announced in the

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[6]See generally, "Ten Years of Non-Retroactivity: A Critique and a Proposal," by Francis X. Beytagh, Va. L. Rev. Vol. 61:1557-1625 (1975).

Dillon decision is a new principle of law whose resolution was not clearly foreshadowed.[7]

Secondly, the prospective application of *Dillon*'s Constitutional protection of substantive rights from the retroactive interpretation of statutes will not retard the operation of the new rule. By determining that the General Assembly did not have the legislative authority to retroactively affect substantive rights of litigants by application of retroactive laws, the Virginia Court set a legislative standard. It would not retard the General Assembly from the passage of unconstitutional legislation to punish litigants who justifiably rely on the presumed Constitutional validity of laws enacted by the General Assembly. Indeed, prospectivity will provide practitioners and litigants with notice of the new standard so that the severe prejudice of unexpected dismissals can be avoided.

Finally, the non-retroactivity of *Dillon*'s ruling will eliminate the severe inequity that would be created by the application of the new standard to parties who have justifiably relied upon the presumed validity of Sec. 8.01-35.1D and previous Virginia case law. This inequity is obvious and severe, i.e., the unexpected dismissal non-settling tortfeasors whose liability would otherwise have required payment of compensation to the Petitioners. As between the litigants, the unconstitutionality of Sec. 8.01-35.1D is an unexpected fortuity for the non-settling Defendants that creates an unfair windfall for the non-settling Defendants and rewards the non-settling

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[7] See, "Release of Joint Tortfeasors--Virginia Code Section 8.01-35.1 and its Retroactive Application," U. Rich. L. Rev. Vol. 18:829-849 (1984); "The Covenant Not to Sue: Virginia's Effort to Bury the Common Law Rule Regarding the Release of Joint Tortfeasors", U. Rich. L. R. Vol. 14:809 at 830 (1980).

Defendants for recalcitrant attitudes toward settlement.

For the foregoing reasons, it is respectfully submitted that the three-pronged criteria of *Chevron* have been met and that the Virginia Court's holding in the *Dillon* case should be applied prospectively only.

CONCLUSION

A Writ of Certiorari should be issued to review the judgment and opinion of the Virginia Supreme Court.

Respectfully submitted,

By

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Attorney for Amicus Curiae Petitioners

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CERTIFICATE

I hereby certify that a true copy of the foregoing Motion for Leave to File *Amicus Curiae* Brief in Support of Petition for a Writ of Certiorari to the Supreme Court of Virginia was mailed by first-class mail, postage prepaid on the 9th day of October, 1985, to the following persons: Frank J. Ceresi, Esq., 2300 South 9th Street, Suite 112, Arlington, VA 22204; Robert Loftus, Esq., Miles & Stockbridge, 4069 Chain Bridge Road, Fairfax, VA 22030; and The Hon. William G. Broaddus, Acting Attorney General, 101 N. 8th Street, Richmond, VA 23219.

Robert R. Hatten

APPENDIX

INDIVIDUAL AMICUS CURIAE PETITIONERS REPRESENTED BY ROBERT R. HATTEN

Virginia Brown, Executrix of the Estate of Wilbur Brown
Lydia Cole, Executrix of the Estate of William Cole
Carole Thomas, Executrix of the Estate of Bennie Cunningham
Thelma Day, Executrix of the Estate of Naaman Day
Elsie Ellis, Executrix of the Estate of Robert Ellis
Laura Farmer, Executrix of the Estate of Melvin Farmer
Joyce Fleetwood, Executrix of the Estate of John Fleetwood
Dixie Folds, Executrix of the Estate of Guy Folds
Virginia Gregory, Executrix of the Estate of Richard Gregory
Bessie Holloway, Executrix of the Estate of Norman Holloway
Hazel Jamerson, Executrix of the Estate of Berkley Jamerson
Maydell Kilpatrick, Executrix of the Estate of Thomas Kilpatrick
Esselle Lambert, Executrix of the Estate of Ben Lambert
Rodney Llewellyn, Executrix of the Estate of Robert Llewellyn
Eleanor Patrick, Executrix of the Estate of William Patrick
Ruby Phillips, Executrix of the Estate of Valdoie Phillips
Frances Rountree, Executrix of the Estate of Charles Rountree
Emmet Steveson, Jr., Executrix of the Estate of Emmet Stevenson, Sr.
Robert Van Dyke, Jr., Executor of the Estate of Robert Van Dyke, Sr.
Maude White, Executrix of the Estate of John White

Frances Williams, Executrix of the Estate of George Williams
Jeanette Zoumplis, Executrix of the Estate of Chris Zoumplis
Elizabeth Timberlake, Executrix of the Estate of Waverly Timberlake
Dorothy King, Executrix of the Estate of Thomas King
Esmond Harding, Executrix of the Estate of John Harding
Sylvia Boykin, Executrix of the Estate of Jeddy Boykin
Willie Mae Crawley, Executrix of the Estate of Irby Crawley
Dora Oman, Executrix of the Estate of Shirley Oman
Doris Folk, Executrix of the Estate of John Folk
Lucille Treblic, Executrix of the Estate of John Treblic
Clara Long, Executrix of the Estate of James N. Long
Eleanor Adams, Executrix of the Estate of Edward Adams
Areathea Burke, Executrix of the Estate of Johnnie Burke
Louise Coiner, Executrix of the Estate of William Coiner
Matilene Shank, Executrix of the Estate of Charles Shank
Mary Alice Turner, Executrix of the Estate of Richard Turner
Esther Washington, Executrix of the Estate of Ivory Washington
Keziabelle Faircloth, Executrix of the Estate of John Faircloth
Kathryn Furlough, Executrix of the Estate of Isaac Furlough
Harvey Peck, Jr., Executor of the Estate of Harvey Peck, Sr.
Mary Strayer, Executrix of the Estate of Harvey Peck, Sr.
Vennie Davenport, Executrix of the Estate of Gregory Davenport

Mary Nicholson, Executrix of the Estate of Jerrell Nicholson
Mary Staton, Executrix of the Estate of Clyde Staton
Jacqueline Haskins, Executrix of the Estate of Verner Truitt
Joanne Lewis, Executrix of the Estate of Harry Lewis
Lois Montgomery, Executrix of the Estate of James Montgonery
Florence Estes, Executrix of the Estate of Walter Estes
Mary K. Smith, Executrix of the Estate of Woodrow Smith
Geraldine Thrower, Executrix of the Estate of Jesse Thrower
Helen Sawyer, Executrix of the Estate of Hubert Sawyer
Joyce Bradley, Executrix of the Estate of John Bradley
Katie Catron, Executrix of the Estate of Frank Catron
Beatrice Eley, Executrix of the Estate of Francis Eley
Juanita Gilbert, Executrix of the Estate of Roy Gilbert
June Cash, Executrix of the Estate of Ronald Cash
Evelyn Stacey, Executrix of the Estate of Milton Stacey
Hazel Watson, Executrix of the Estate of Homer Watson
Nonie White, Executrix of the Estate of Walter J. White
Joyce Tignor, Executrix of the Estate of Robert Barlow
Mary Barnette, Executrix of the Estate of Alexander Barnette
Elsie S. Barnes, Executrix of the Estate of Edwin E. Barnes
Jerry Michael Cale, Administrator of the Estate of William F. Cale
Irene Coggins, Executrix of the Estate of William H. Coggins
Mary J. Dennis, Executrix of the Estate of Russell A. Dennis

Clara M. Deshields, Administratrix of the Estate of Norman Willoughby Deshields

Yvonne P. Ellington, Administratrix of the Estate of Wayland C. Ellington

Sarah M. Ferris, Administratrix of the Estate of James H. Ferris

Guy Campbell, Administrator of the Estate of Joseph Hart

Michael L. Hill, Sr., Administrator of the Estate of George M. Hill, Sr.

Thelma P. Jones, Administratrix of the Estate of Elbert W. Jones

Charles Wesley Mann, Administrator of the Estate of Elizabeth Frances Mann

Lawrence J. Wiser, Administrator of the Estate of George R. Passaro

Gertrude Rideout, Executrix of the Estate of John Andrew Rideout

Sarah L. Ross, Administratrix of the Estate of Stanley Ernest Ross

Nancy Stack, Administratrix of the Estate of Warren O. Stack

Mildred W. Taylor, Administratrix of the Estate of Richard C. Taylor

C. Belle Louthian, Executrix of the Estate of Fafael Ware

J. James Basgier, Jr., Administrator of the Estate of Milton M. White

Mary Louis T. Archer, Administratrix of the Estate of Raymond B. Archer

Carolyn H. Burrow and William A. Bagley, Jr., Co-Administrators for William A. Bagley, Sr.

Louise Greene Duke, Administrator of the Estate of John Elton Duke, Jr.

William C. Feamster, III, Administrator of the Estate of William C. Feamster, Jr.

Kathryn Ann Gravitt, Administratrix d. b. n. of the Estate of Barksdale E. Gravitt

Pearlene T. Miles, Administratrix of the Estate of Jesse Miles

Alma Steber Reutlinger, Executrix of the Estate of Clarence Reutlinger

Doris Coates, Executrix of the Estate of James P. Coates

Cora Lee Hardy and Stephen C. Hardy, Co-Administrators of the Estate of Carl C. Hardy, Jr.

Doris F. Isenhower, Administratrix of the Estate of Max H. Isenhower

Rachel E. Knick, Administratrix of the Estate of Earl B. Knick

Ida L. Miltier, Executrix of the Estate of Joseph Miltier

Martha W. Morris, Executrix of the Estate of Rufus Hamilton Morris III

James R. Revell, Administrator of the Estate of Charles E. Ravell, Sr.

John C. Lumpkin, Administrator of the Estate of George H. Riddick

Nancy Cook Robertson, Executrix of the Estate of James H. Robertson

Ellen Ann Rooney, Executrix of the Estate of Henry Francis Rooney

Thelma R. Harts, Executrix of the Estate of Cephus Roscoe

Hattie S. Thornton, Administratrix of the Estate of Cedric W. Thornton

Marylin C. Tolson, Administratrix of the Estate of John T. Tolson, Jr.

Louella Vess, Administratrix of the Estate of James A. Vess

Evelena Wells, Executrix of the Estate of Jessie Wells

Edith D. White, Executrix of the Estate of Linwood Erle White, Jr.

Peggy Lawrence, Administratrix of the Estate of Edward Delaware Lawrence

Betty Hobbs, Executrix of the Estate of William Staley Hobbs

Linda Ann Oliver, Administratrix of the Estate of William Lewis

Esther Bailey, Executrix of the Estate of Samuel Bailey
Dorothy Coday, Executrix of the Estate of Jack Coday
Sadie V. Cooke, Executrix of the Estate of Walter Cooke
Mae Kellis, Executrix of the Estate of Fred K[illegible]is
Ruth Martin, Executrix of the Estate of Elme[illegible]Martin
Lucille Mixon, Executrix of the Estate of Henry Mixon
Bessie L. Ryan, Executrix of the Estate of William Ryan

Louis Bagley
Clyde Baity
Perry Barclift
Robert Barnes
Edgar C. Barrett
Robert H. Bass
Chester Bellamy
Percell Beverly
John H. Bobbitt
George G. Bosher
Bobby Brady
Horace Brinson
Jesse L. Britton
Clarence C. Brock
Otha B. Brodnax
Frederick Brown
Arthur C. Burris
Henry O. Byrd
James L. Canady
Reginald C. Cannon
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Robert Carter
John L. Charity
William Clark
Hillard Coffie
Ellis R. Colbert
Walter I. Cooper
William Cooper
Benjamin Craddock
Nelson U. Crosby

Alvin Davidson
Jesse O. Davis
Percy O. Davis
Robert Dudley
Woodrow Duncan
Edward C. Dunn
Jesse C. Dunning
Anthony J. Dusseau
Thomas Elliott
Donahue Ellis
William J. Embler
Jerry Evans
William Evans
David J. Evers
Wallace Fairfield
James Favre
Joseph L. Firth
William Firman
Richard B. Flora
Charles I. Floyd
Charles Forrester
Hobert L. Furr
Shirley A. Garris
Willie Gibbons
William F. Glazier
Gerald Gorde
John Gould
James Groome
David Guthrie
Lacy Hall

Arthur Croxton
Dallas P. Cutler
Arthur M. Daniel
Elliott Gupton
Orian I. Leonard
Billy Ray Lockard
Woody London
Roscoe D. Loyd
John Luter
James A. Mahady
Major T. Manning
Edward A. Mason
Robert Massengill
Hugh McCain
Walter D. McCloud
Samuel Midyette
Joseph N. Moody
Irving T. Moore
Wilton Moore
James Morant
Jesse V. Myers
James R. Neeley
John F. Newton
Delbert Nicholas
James T. Oman
Hardy Osborne
Ray T. Outland
George C. Overman
Garland C. Parrish
David F. Peele
Bernis Pierce
Dorsey Pittman
Clyde Powell
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Dallas Pruitt
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Hugh V. Reynolds
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Fred Thompson

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Thomas E. Henderson
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Garland R. Hess
John Gill
Jesse E. Hitt
M. J. Hobgood
James Hogge
Thomas J. Hogge
Maurice Holloway
Wilbur Holt, Sr.
George S. Hopkins
Alexander Howard
Floyd A. Hudgins
Jay P. Huneycutt
Colden Hyman
Linwood Illich
Roy E. Jackson
Jesse E. James
Gaston B. Jamison
Albert Johnson
Colonel D. Jones, Jr.
Herman F. Jones
Wilson W. Jones
Charlie Keatts
Raymond Kerr
Woodrow Kincaid
John O. Kirby
Claude E. Lane
Eugene Langley
Garnett LaPrade
Albert Lawrence
Ernest H. Lawson
Paul Lee, Sr.
Bruce T. Leggett
Cecil B. Leigh
Robert P. Riggs
William K. Roach
Robert Roane
Henderson Roberts

Robert Thompson
Walter Thon
William Thrasher
Jesse Topping
Clinton A. Townsend
Ted Treadway
Leon Treadwell
Compton Turner
John B. Tweedy
Arthur Volhein
Fred Walker
Claude R. Watts
Ethell C. West
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James White
Otis White
Conley C. Wilds
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James M. Williams
William Williams
Raymond D. Wilson, Jr.
Thomas Woodard
James Worsley
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Melvin Wright
B. C. Young, Jr.
Herbert Yow
Robert A. Burke, Jr.
Tommy Nelson Hare
George Harrison, Jr.
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George Sanders
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Edker Saunders
Melvin Saunders
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William Sawyer
Henry Schaffer
Robert Schaffer
Edward Scott
John C. Scruggs
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Edward N. Lutz
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James E. West
Hayes L. Whiddon
Leone Maxine Sheffer (deceased)
Arthur J. Golden (deceased)
Homer C. Crane (deceased)
Moses Lee Johnson
Albert Ray Long
Ray W. McClung
Horace F. Nichols
Esker Eddie Reed, Jr.
Irvin B. Slayton
Clyde K. Tysor

Rufus H. Buffaloe
Francis Marion Cave
Silver J. Ciccone
Earl Clow, Jr.
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Charles Wesley Mann
Lemuel Lee Newsom
James L. Pigg
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Weeks Smith
Robert H. Weaver